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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1986

AMERICAN TRUCKING ASSOCIATIONS,
INC, et al.

Appellants

v.

JAMES I. SCHEINER, Secretary of the
Department of Revenue, et al.

Appellees

On Appeal From The
Supreme Court of Pennsylvania

BRIEF OF THE TRANSPORTATION CABINET OF THE COMMONWEALTH OF KENTUCKY, AMICUS CURIAE, IN SUPPORT OF APPELLEES

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TABLE OF CONTENTS

Table of Authorities . . . . . (i)

INTRODUCTION 2

A. Interest Of The Amicus. 2

B. Kentucky's Highway Tax System . . 4

SUMMARY OF ARGUMENT. 9

ARGUMENT 11

REASONABLE FLAT FEES ON MOTOR CARRIERS, SUCH AS THOSE IMPOSED BY PENNSYLVANIA, ARE A RATIONAL MEANS OF RAISING REVENUES AND DO NOT INHERENTLY VIOLATE THE COMMERCE CLAUSE 11

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Aero Mayflower Transit Co. v. Board of R.R. Commissioners, 332 U.S. 495 (1947) 14

Aero Mayflower Transit Co. v. Georgia Public Service Commission, 295 U.S. 285 (1935) 3, 10, 21

Arizona v. Rumsey, 467 U.S. 203, 212 (1984). 20

Capitol Greyhound Lines v. Brice, 339 U.S. 542 (1950) 14-15, 18

Clark v. Paul Gray, Inc., 306 U.S. 583 (1939) 13

Clark v. Poor, 274 U.S. 554 (1927). 12

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977). 13

Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). 20

Madden v. Kentucky, 309 U.S. 83 (1940). 12

Massachusetts v. United States, 435 U.S. 444 (1978) 3, 10, 18, 19

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981). 11

Morf v. Bingaman 298 U.S. 407 (1936). 14

Western and Southern Life Insurance Co. v. State Board of Equalization, 451 U.S. 648 (1981) 19

STATUTES

KRS 138.655(5). 4

KRS 138.655(7). 4

KRS 138.660 . . . . . 8, 9

KRS 138.660(1). 4

KRS 138.660(2). 4

KRS 138.660(4). 1

REPORTS

J. Black and J. Pigman, Allocation of Transportation Costs to Users (May 1982). 6-7

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Pursuant to Rule 36 of this Court, the Transportation Cabinet of the Commonwealth of Kentucky, by its undersigned, respectfully submits this Brief as amicus curiae in support of the Appellees.

INTRODUCTION

A. Interest Of The Amicus.

KRS 138.660(4), enacted during the 1986 session of the Kentucky General Assembly, imposes a supplemental highway users tax (the "SHU tax") on operators of large trucks in an amount based on miles traveled in Kentucky, with a miniumum fee of $150 and a maximum fee of $200 payable annually. The SHU tax has been identified by the Appellants and others as a non-proportional or flat tax which, they claim, violates the Commerce Clause. The lead Appellant, American Trucking Associations, Inc., and several of its members have challenged the constitutionality of the SHU tax in a lawsuit filed in the Franklin Circuit Court, Franklin County, Kentucky, styled American Trucking Associations, Inc., et al. v. Commonwealth of Kentucky, et al., No. 86-CI-0464. That action has been stayed pending the disposition of this proceeding.

While there are significant differences between the Pennsylvania taxes at issue here and the SHU tax, so that the Court's holding here will not necessarily be dispositive of the Kentucky lawsuit, the outcome of this case could have a substantial impact on the SHU tax. The Appellants have argued that any tax (regardless of amount) which is not precisely proportional to highway use, and in particular any flat tax, runs afoul of the Commerce Clause. Appellants ask the Court to repudiate a long line of precedent--based upon Aero Mayflower Transit Co. v. Georgia Public Service Commission, 295 U.S. 285 (1935), and most recently reaffirmed in Massachusetts v. United States, 435 U.S. 444, 463-470 (1978)--approving of reasonable flat fees on common carriers. As set forth more fully below, such a drastic departure from existing law is unwarranted and would improperly invade the States' perogative to impose reasonable fees and

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taxes on the users of its streets and highways.

B. Kentucky's Highway Tax System.

Kentucky imposes a three-tiered tax on motor carriers using its highways. First, every motor carrier, i.e., operators of any "commercial truck or commercial tractor-trailer combination having a total of three (3) or more axles," KRS 138.655(5), must pay the same nine percent (9%) motor fuel tax paid by operators of any other vehicle when gasoline or other fuel is purchased at the service station. KRS 138.660(1).

Second, in addition to the motor fuel tax, each "heavy equipment motor carrier" must pay a surtax of two percent (2%) of the average wholesale price of gasoline and other fuels used in operation on Kentucky highways. KRS 138.660(2). "Heavy equipment motor carrier" includes all "motor carriers" except motor vehicles used to transport persons for hire. KRS 138.655(7). Both the motor fuel tax and surtax have existed since the mid-1950s.

Finally, with the enactment of the SHU tax, all motor carriers having a combined licensed weight of 60,000 pounds or more must pay an annual user fee according to the following schedule:

Annual Mileage Class	User Fee
Less than 10,000 miles	$150
10,000 to 19,999 miles	$160
20,000 to 29,999 miles	$170
30,000 to 39,999 miles	$180
40,000 miles and over	$200

The SHU tax was enacted by the Kentucky Legislature as part of an effort to remedy several fundamental problems it perceived with the cost of Kentucky's highway system and the allocation of those costs among the various classes of highway users. These problems were the subject of a study conducted in 1980-81 by the Kentucky Transportation Research Program of the College of Engineering, University of Kentucky, under the sponsorship of the Kentucky Department of Transportation and the Federal Highway Administration, United States Department of Transportation.

J. Black and J. Pigman, Allocation of Transportation Costs to Users (May 1982) (the "UK Study").

The UK Study was commissioned to determine the cost responsibility and user generated revenue for each class of vehicle traveling over Kentucky's highways. It is premised on the generally accepted notion that the cost of highway design, construction, maintenance and operation can be allocated among the various vehicle classes using public highways. For example, the ability of a vehicle to maintain constant speed is a function of the highway grade and horsepower to weight ratio. That ratio tends to decrease with increasing gross vehicle weight. Heavy vehicles thus require a flatter grade to maintain a constant speed. The UK Study recognized that the additional cost of grading and drainage necessary to provide a flatter grade should be allocated to heavy vehicles. Similarly, heavier vehicles

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require greater pavement thickness, wider shoulders, wider and sturdier bridges and more maintenance costs for upkeep of pavement and shoulders. The increased highway costs which result should also be borne by these vehicles.

The UK Study produced two significant findings. First, it showed that Kentucky was failing to provide sufficient revenue to maintain its present highway system. Second, the UK Study demonstrated a substantial disparity among vehicle types with respect to the allocation of the cost burden for Kentucky highways. Using 1980 statistics, the data compiled for the UK Study showed that automobiles and pickups paid 157% of their share of highway costs while trucks paid only 54% of their share. In particular, the heaviest trucks (those with a maximum gross weight of 62,000 pounds or more) accounted for only 52% of their share of highway costs.

The UK Study is consistent with a similar study performed in 1982 by the Federal

Highway Administration, which also concluded that the heaviest trucks were paying far less than their fair share of highway costs. Federal Highway Administration, U.S. Dept. of Transportation, Final Report on the Federal Highway Cost Allocation Study (May 1982). Congress acted on the findings of this study in 1982 and 1984 by increasing federal user charges on heavy trucks. The Kentucky Legislature similarly responded when it enacted the SHU tax in 1986. By imposing the SHU tax on the operators of the heaviest trucks, the Kentucky General Assembly sought to both alleviate the shortfall in highway revenues and ameliorate the inequitable distribution of highway costs. In short, the three-tiered taxing structure of KRS 138.660 aims to bring heavier motor carriers into greater parity with automobiles and pickups in terms of their responsibility for highway construction and maintenance costs.

The SHU tax is an important part of Kentucky's highway budget. Under existing Kentucky law, no funds from the general revenue budget can be allocated to the Transportation Cabinet for highway construction and maintenance. Instead, the Transportation Cabinet must rely for highway funding on those revenues generated directly from highway users, particularly the motor fuel and other taxes imposed by KRS 138.660. The SHU tax is one source of funds by which the General Assembly offsets the loss to the Transportation Cabinet of General Fund revenues. Estimated SHU tax revenues will total about $60 million, or ten percent (10%) of Kentucky's road fund. Significantly, these sums will be collected from a group that was previously paying only half of its share of highway costs.

SUMMARY OF ARGUMENT

This Court historically has accorded the States wide latitude in developing systems of taxation to pay the enormous

costs associated with our streets and highways. Highway use tax formulas based on many different factors have been approved even though these formulas did not precisely apportion taxes according to road use. The Court has particularly approved reasonable flat fees on motor carriers, first in Aero Mayflower Transit Co. v. Georgia Public Service Commission, 295 U.S. 285 (1935) and continuing through Massachusetts v. United States, 435 U.S. 444 (1978).

Flat fees or taxes on motor carriers are appropriate methods of raising highway funds because they are administratively convenient and, most importantly, can insure that large trucks as a group pay their fair share of highway costs. The Appellant's argument against flat fees is premised on the misguided notion that fuel taxes are the "fairest" form of highway tax. In fact, fuel tax payments do not increase proportionately with vehicle weight, and

higher fuel taxes merely continue existing imbalances in highway cost responsibility among vehicle classes. Reasonable flat fees or taxes on large trucks are a rational means of efficiently raising funds from the vehicle class causing most damage to our highways. The determination of how to raise these needed revenues is a legislative matter which should not be second-guessed by the courts.

ARGUMENT

REASONABLE FLAT FEES ON MOTOR CARRIERS, SUCH AS THOSE IMPOSED BY PENNSYLVANIA, ARE A RATIONAL MEANS OF RAISING REVENUES AND DO NOT INHERENTLY VIOLATE THE COMMERCE CLAUSE.

The Court has long cautioned against the use of the judicial power to usurp the function of the legislative branch of government. The propriety, wisdom and expediency of legislative enactments is exclusively a legislative matter. See, e.g., Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981). This is partic-

ularly true in the area of taxation: "[I]n taxation, even more than in other fields, legislatures possess the greatest freedom. . . ." Madden v. Kentucky, 309 U.S. 83, 88 (1940).

Following the principles applicable to other taxing statutes, the Court has accorded the States broad discretion in levying taxes and fees for road use by interstate and intrastate motor carriers. Over half a century ago, the Court recognized that additional taxes may be imposed upon common carriers like the Appellants because of the unique nature of their business and their frequent use of the public roadways. "Common carriers for hire, who make the highways their place of business, may properly be charged an extra tax for such use." Clark v. Poor, 274 U.S. 554, 557 (1927). The Court has since approved a wide variety of state highway taxes, and in so doing, has established well-defined guidelines for determining the

constitutionality of these taxes. These guidelines are embodied in the four part test of Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977). Highway use fees or motor fuel taxes are valid so long as they:

(1) apply to an activity having a "substantial nexus" with the taxing state;

(2) are "fairly apportioned;"

(3) do not discriminate against interstate commerce; and

(4) are "fairly related" to the services provided by the state.

Over the years, the Court has recognized that many different methods and amounts of taxation as well as classifications of highway users may satisfy the Brady test. This is true because "[t]he classification of the traffic for the purposes of regulation and fixing fees is a legislative, not a judicial, function" and will not be overturned unless it is "without

rational basis." Clark v. Paul Gray, Inc., 306 U.S. 583, 594 (1939).

In line with this reasoning, the Court has repeatedly stressed that highway use taxes may be based on any number of factors. The Court has approved taxes based on mileage, vehicle weight, tonnage-capacity, horsepower, vehicle value and gross revenues derived from operations within the State, even though these formulas may not precisely apportion taxes according to road use. See, e.g., Capitol Greyhound Lines v. Brice, 339 U.S. 542, 544 (1950); Aero Mayflower Transit Co. v. Board of R.R. Commissioners, 332 U.S. 495, 506 (1947); Morf v. Bingaman 298 U.S. 407, 412 (1936).

The discretion accorded States in the implementation of highway taxes has also extended to the imposition of reasonable flat fees. In Capitol Greyhound Lines v. Brice, supra, for example, the Court held that a state could levy a flat fee on motor carriers for the privilege of using

state highways even though "clearly a flat fee is not geared to mileage, weight or any other factor relevant in considering the fairness of compensation for road use." Id. at 545. "Rough approximation", rather than "complete fairness", was sufficient to validate the highway tax formula at issue in Capitol because of the administrative burden of enforcing a tax formula which varies "with every factor affecting appropriate compensation for road use." Id. at 546.

The Appellants have asked the Court to depart from this well-established precedent and to hold that a flat highway tax, however reasonable in amount, is inherently unconstitutional. In pressing this claim, the Appellants seek to enshrine as constitutional dogma the principle that mileage related fuel taxes are the only levies that satisfy the Brady criteria. States have a reasonable and rational basis, however, for rejecting increases in their fuel taxes in

favor of flat fees or other taxes on large trucks when considering ways to raise needed revenues.

The Appellants assert that fuel taxes are the "fairest and most economically efficient form of highway tax" (Brief for Appellants at 40). In fact, increases in fuel taxes only exacerbate existing inequities in the distribution of highway costs among highway users. Fuel tax payments actually increase very little as vehicle and axle weights rise because fuel consumption, while increasing with vehicle size and weight, does not increase proportionately with cost responsibility. Federal Highway Administration, U.S. Dept. of Transportation, Alternatives to Tax on Use of Heavy Trucks at III-4 (Jan. 1984). While the per mile cost responsibility of an 80,000 pound truck may be 15 to 16 times greater than the per mile responsibility of an automobile, the truck may use only three to four times the fuel used by the average

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passenger car for a comparable amount of travel. Thus, fuel consumption alone does not adequately reflect the cost responsibility of vehicles of different sizes and weights.

Fuel taxes can never be made to match highway cost responsibility for all vehicle classes. Higher fuel taxes merely shift the point at which trucks move from overpaying to underpaying while causing light vehicles to overpay by a greater amount. The 1984 study conducted by the federal Department of Transportation, for example, concluded that all trucks pay less than their cost responsibility with a 9 cents per gallon fuel tax. At 30 cents per gallon, only trucks weighing 58,000 pay taxes equal to their cost responsibility, while all other vehicle classes would be forced to overpay. "[E]ven a fuel tax at 30 cents a gallon, if used as the single source of highway revenues, would fail to collect adequately for cost responsibility of heavy trucks." Id.

In contrast to the fuel tax, a reasonable flat tax can allocate the increase in highway taxes to the vehicle class doing most of the damage to our highways--heavy trucks. A flat tax also eliminates very real administrative problems that can arise from other tax formulas. As the Court recognized in Massachusetts v. United States, supra, 435 U.S. at 466, precisely calculated user fees naturally increase administrative costs and, consequently, the amount of revenue needed to operate the system. While it may be theoretically possible to devise a taxing formula that would account for every factor affecting road use and cost responsibility, the age of a computer in every vehicle constantly assessing highway taxes has not yet arrived. In any event "[s]ystems of taxation need not achieve the ideal." Capitol Greyhound Lines v. Brice, supra, 339 U.S. at 552 (Frankfurter, J., dissenting). Purely theoretical or scientific conformity must

yield to the practical convenience of a particular classification of carriers for purposes of highway taxes.

Highway taxes have two goals--to raise necessary revenue, and to fairly allocate highway costs. A properly structured flat tax, when combined with registration fees and fuel taxes, can properly meet each of these goals. The determination of how these goals are to be met, however, is the province of the States and their legislatures, not the courts. "[C]ourts are not empowered to second-guess the wisdom of state policies. [R]eview is confined to the legitimacy of the purpose." Western and Southern Life Insurance Co. v. State Board of Equalization, 451 U.S. 648, 670 (1981) (emphasis in original).

As recently as 1978 in Massachusetts v. United States, 435 U.S. 444 (1978), the Court reaffirmed its long line of cases approving of reasonable flat fees on motor carriers. The States have relied on this

precedent by implementing a wide variety of highway taxes, many of which include some flat fee or tax. "[A]ny departure from the doctrine of stare decisis demands special justification." Arizona v. Rumsey, 467 U.S. 203, 212 (1984). "The stability of judicial decision, and with it respect for the authority of this Court, are not served by the precipitous overruling of multiple precedents. . . ." Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 559 (1985) (Powell, J., dissenting). The prior holdings of this Court have not hindered the growth of our interstate trucking industry and all highway taxes, including flat fees, must still meet the requirements of the Brady test. Under these circumstances, there is no justification for the drastic relief requested by the Appellants.

CONCLUSION

Taxes are never popular. Nevertheless, the highway use taxes assessed by Pennsylvania on operators of heavy trucks,

who make the highways their place of business, are hardly so onerous or irrational as to violate the Commerce Clause. The real question confronting the Court is who should pay these highway taxes. Under the guise of a Commerce Clause attack on flat fees, the trucking industry seeks judicial mandate of a highway tax system that would shift the tax burden to vehicles that already pay more than their fair share of highway costs. The Transportation Cabinet of the Commonwealth of Kentucky urges the Court to reject this approach by adhering to Aero Mayflower and its progeny and affirming the decision of the Pennsylvania Supreme Court.

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